

**Appeal No. 2014AP2812**

**Cir. Ct. No. 2012CV6272**

**WISCONSIN COURT OF APPEALS  
DISTRICT I**

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**ASCARIS MAYO AND ANTONIO MAYO,**

**PLAINTIFFS-RESPONDENTS-CROSS-  
APPELLANTS,**

**UNITED HEALTHCARE INSURANCE COMPANY AND  
WISCONSIN STATE DEPARTMENT OF HEALTH SERVICES,**

**INVOLUNTARY-PLAINTIFFS,**

**V.**

**WISCONSIN INJURED PATIENTS AND FAMILIES  
COMPENSATION FUND,**

**DEFENDANT-APPELLANT-CROSS-  
RESPONDENT,**

**PROASSURANCE WISCONSIN INSURANCE COMPANY,  
WYATT JAFFE, MD, DONALD C. GIBSON, INFINITY  
HEALTHCARE, INC. AND MEDICAL COLLEGE OF  
WISCONSIN AFFILIATED HOSPITALS, INC.,**

**DEFENDANTS.**

**FILED**

**JUL 19, 2016**

Diane M. Fremgen  
Clerk of Supreme Court

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**CERTIFICATION BY WISCONSIN COURT OF APPEALS**

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Before Curley, P.J., Kessler and Brash, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2013-14),<sup>1</sup> this appeal is certified to the Wisconsin Supreme Court for its review and determination.

## ISSUE

Whether the \$750,000 statutory cap on noneconomic damages recoverable in medical malpractice claims, as amended by 2005 Wis. Act 183 and codified in WIS. STAT. § 893.55, violates Ascaris and Antonio Mayo's (the Mayos) constitutional rights as articulated in *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440.

## BACKGROUND

According to facts adduced at trial, in May 2011, Ascaris Mayo visited the emergency room of Columbia St. Mary's Hospital in Milwaukee for abdominal pain and a high fever. Mayo was seen by Dr. Wyatt Jaffe and a physician's assistant, Donald Gibson. Gibson, who was working under Dr. Jaffe, included infection in his differential diagnosis and admitted at trial that Mayo met the criteria for Systemic Inflammatory Response Syndrome; however, neither medical professional informed Mayo about the diagnosis or the available treatment, namely, antibiotics. Instead, Mayo was treated for uterine fibroids because she had a history of the condition, and was told to follow up with her personal gynecologist. Mayo's condition worsened the following day, prompting her to visit a different emergency room, where she was diagnosed with a septic

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

infection caused by the untreated infection. Mayo fell comatose for a period of time and eventually became minimally responsive until she was transferred to another medical facility. The infection was eventually treated; however, the sepsis caused nearly all of Mayo's organs to fail and led to dry gangrene in all four of Mayo's extremities. This ultimately resulted in the amputation of all four of Mayo's extremities.

The Mayos sued Dr. Jaffe, Gibson, Infinity Health Care, Inc., ProAssurance Wisconsin Insurance Co., and the Wisconsin Injured Patients and Families Compensation Fund ("the Fund"), alleging medical malpractice and failure to provide proper informed consent. Prior to trial, the Fund filed a motion to consider constitutionality issues. The circuit court addressed the issue of whether the statutory cap on noneconomic damages, as set forth in WIS. STAT. § 893.55(4)(d)1. ("the cap"), was unconstitutional. Ultimately, the circuit court held that the cap was not facially unconstitutional but allowed the Mayos to raise an as-applied challenge to the cap post-trial if the Mayos so chose.

The case proceeded to a jury trial. The jury found that neither Dr. Jaffe nor Gibson was medically negligent, but that both medical professionals failed to provide Mayo with the proper informed consent regarding her diagnosis and treatment options. As relevant to the issue we certify, the jury awarded Ascaris Mayo \$15,000,000 in noneconomic damages and \$1,500,000 to Antonio Mayo for loss of society and companionship.

The Fund filed a post-verdict motion to reduce the Mayos' jury award consistent with the cap. The Mayos filed a motion seeking entry of judgment on the verdict, arguing that an application of the cap would violate their constitutional rights. The Mayos also renewed their pre-trial facial challenge to

the cap. The circuit court determined that the cap was not facially unconstitutional, but was unconstitutional as applied to the Mayos' jury award because it violated the Mayos' rights to equal protection and due process. Relying in part on the principles articulated in *Ferdon*, the circuit court made multiple findings, including: (1) an application of the cap would reduce the Mayos' jury award on noneconomic damages by 95.46 percent; (2) there is no rational basis for depriving Ascaris Mayo, who is largely immobile, of the award the jury deemed appropriate to compensate her for her injuries; (3) reducing the Mayos' jury award would not further the cap's purpose of promoting affordable healthcare to Wisconsin residents while also ensuring adequate compensation to medical malpractice victims; (4) the Fund is financially fully capable of honoring the jury's award; and (5) applying the cap would not advance the legislative purpose of "policing high or unpredictable economic damage awards." Both the Mayos and the Fund appeal.

## DISCUSSION

Certification of this case stems from what we perceive to be a conflict between the principles articulated in *Ferdon* and the legislature's subsequent amendment of the statutory cap on noneconomic damages as applied to this particular set of facts. Specifically, whether the application of the cap would be unconstitutional as applied to the Mayos, where the effect of enforcing the cap would reduce their jury award by over 95 percent. We believe that the principles articulated in *Ferdon* apply to the facts of this case, but note that the Wisconsin Supreme Court in *Ferdon* struck down the \$350,000 statutory cap on noneconomic damages as a whole. Here, we ask the court to evaluate the cap as it applies to the Mayos.

If a challenger succeeds in a facial attack on a law, the law is void “from its beginning to the end.” *State ex rel. Comm’rs of Pub. Lands v. Anderson*, 56 Wis. 2d 666, 672, 203 N.W.2d 84 (1973). In contrast, in an as-applied challenge, we assess the merits of the challenge by considering the facts of the particular case in front of us, “not hypothetical facts in other situations.” *See State v. Hamdan*, 2003 WI 113, ¶43, 264 Wis. 2d 433, 665 N.W.2d 785. Under such a challenge, the challenger must show that his or her constitutional rights were actually violated. *See Anderson*, 56 Wis. 2d at 672. If a challenger successfully shows that such a violation occurred, the operation of the law is void as to the party asserting the claim. *See id.*

We believe a brief summary of the facts and principles of *Ferdon*, along with a brief summary of the legislative change that resulted from the *Ferdon* case, are helpful tools for understanding the issue we certify.

***Ferdon v. Wisconsin Patients Compensation Fund***

A jury awarded Matthew Ferdon \$700,000 in noneconomic damages for medical negligence which occurred at his birth, resulting in partial paralysis and deformity in his right arm. *Ferdon*, 284 Wis. 2d 573, ¶¶2, 3. After the verdict, the Fund moved to reduce the award in accordance with the statutory cap on noneconomic damages, which at the time was \$350,000 (adjusted for inflation). *Id.*, ¶¶4, 8. The circuit court granted the motion. *Id.*, ¶6. Ferdon appealed on several grounds. As relevant to the issue we certify, he argued that the statutory cap violated his equal protection and due process rights guaranteed by the Wisconsin Constitution. *Id.*, ¶9.

Using a rational basis level of scrutiny, the *Ferdon* court noted that the “standard in the equal protection context does not require that all individuals

be treated identically, but any distinctions must be relevant to the purpose motivating the classification.” *Id.*, ¶72. The court declared its goal as one to “determine whether the classification scheme rationally advances the legislative objective.” *Id.*, ¶81. The classification in *Ferdon* was the “distinction between medical malpractice victims who suffer over \$350,000 in noneconomic damages, and medical malpractice victims who suffer less than \$350,000 in noneconomic damages.... In other words, the statutory cap creates a class of fully compensated victims and partially compensated victims.” *Id.*, ¶82. The court found that “the cap’s greatest impact falls on the most severely injured victims.” *Id.*

While the court acknowledged several legislative objectives for the creation of the cap, including concern that medical malpractice lawsuits raise the cost of malpractice insurance for providers, which in turn is believed to increase medical costs for the public, the court found that “[t]he primary, overall legislative objective is to ensure the quality of health care for the people of Wisconsin.” *Id.*, ¶¶87, 89.

With the legislative objectives in mind, the court ultimately concluded “that a rational relationship does not exist between the classifications of victims in the \$350,000 cap on noneconomic damages and the legislative objective of compensating victims of medical malpractice fairly.” *Id.*, ¶105. While the court found the cap to be “intuitively” related to the legislative objectives, the court stated that:

when the legislature shifts the economic burden of medical malpractice from insurance companies and negligent health care providers to a small group of vulnerable, injured patients, the legislative action does not appear rational.... If the legislature’s objective was to ensure that Wisconsin people injured as a result of medical malpractice are compensated fairly, no rational basis exists for treating the

most seriously injured patients of medical malpractice less favorably than those less seriously injured.

*Id.*, ¶¶101, 102, 109. The *Ferdon* court concluded that the cap was unconstitutional.

### ***2005 Wis. Act 183***

In response to *Ferdon*, the Wisconsin Legislature amended the statutory cap on noneconomic damages, as reflected in WIS. STAT. § 893.55. The legislature explained the objectives of the cap within the text of the statute:

**(1d)** (a) The objective of the treatment of this section is to ensure affordable and accessible health care for all of the citizens of Wisconsin while providing adequate compensation to the victims of medical malpractice. Achieving this objective requires a balancing of many interests. Based upon documentary evidence, testimony received at legislative hearings, and other relevant information, the legislature finds that a limitation on the amount of noneconomic damages recoverable by a claimant or plaintiff for acts or omissions of a health care provider, together with mandatory liability coverage for health care providers and mandatory participation in the injured patients and families compensation fund by health care providers, while compensating victims of medical malpractice in appropriate circumstances by the availability of unlimited economic damages, ensures that these objectives are achieved. Establishing a limitation on noneconomic damage awards accomplishes the objective by doing all of the following:

1. Protecting access to health care services across the state and across medical specialties by limiting the disincentives for physicians to practice medicine in Wisconsin, such as the unavailability of professional liability insurance coverage, the high cost of insurance premiums, large fund assessments, and unpredictable or large noneconomic damage awards, as recognized by a 2003 U.S. congress joint economic committee report, a 2003 federal department of health and human services study, and a 2004 office of the commissioner of insurance report.

2. Helping contain health care costs by limiting the incentive to practice defensive medicine, which increases the cost of patient care, as recognized by a 2002 federal department of health and human services study, a 2003 U.S. congress joint economic committee report, a 2003 federal government accounting office study, and a 2005 office of the commissioner of insurance report.

3. Helping contain health care costs by providing more predictability in noneconomic damage awards, allowing insurers to set insurance premiums that better reflect such insurers' financial risk, as recognized by a 2003 federal department of health and human services study.

4. Helping contain health care costs by providing more predictability in noneconomic damage awards in order to protect the financial integrity of the fund and allow the fund's board of governors to approve reasonable assessments for health care providers, as recognized by a 2005 legislative fiscal bureau memo, a 2001 legislative audit bureau report, and a 2005 office of commissioner of insurance report.

§ 893.55(1d)(a)1.-4.

Many of the legislative objectives described in the statute mirror the objectives outlined by the Wisconsin Supreme Court in *Ferdon*. In essence, the legislature concluded that the main objective of the statute is to ensure affordable and quality health care for Wisconsin residents, while also ensuring that victims of medical malpractice are adequately compensated. The legislature concluded that a \$750,000 cap on noneconomic damages limits disincentives for Wisconsin physicians by keeping malpractice insurance premiums low, contains the cost of patient care, allows for a more predictable insurance market, and protects the financial solvency of the Fund.



***Application of Ferdon and WIS. STAT. § 893.55(1d)(a) to the Mayos’ Equal Protection and Due Process Challenges***

Since the amendment of the statutory cap, the Wisconsin Supreme Court has not addressed the constitutionality of WIS. STAT. § 893.55 as applied to a surviving member of the class of “partially compensated victims” described in *Ferdon*. Here, the specific issue is whether enforcing the cap violates the Mayos’ equal protection and due process rights.

“Equal protection guarantees that similarly-situated persons are treated similarly.” *State ex rel. Harr v. Berge*, 2004 WI App 105, ¶5, 273 Wis. 2d 481, 681 N.W.2d 282. “Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made.” *State v. Post*, 197 Wis. 2d 279, 321, 541 N.W.2d 115 (1995) (citation omitted). “When considering an equal protection challenge to a statute, this court employs the rational basis test, unless the statute involves a suspect class or a fundamental right.” *See Kohn v. Darlington Cmty. Sch.*, 2005 WI 99, ¶46, 283 Wis. 2d 1, 698 N.W.2d 794.

The “basic formulation” of the rational basis test is the same in both facial and as-applied challenges. *See Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006). Under this standard, the constitution requires only that the statute creating a classification be “rationally related to a valid legislative objective.” *State v. Jorgensen*, 2003 WI 105, ¶32, 264 Wis. 2d 157, 667 N.W.2d 318 (citation omitted); *State v. McGuire*, 2010 WI 91, ¶43, 328 Wis. 2d 289, 786 N.W.2d 227.

“The Due Process Clause of the Fourteenth Amendment prohibits a state from depriving ‘any person of life, liberty, or property without due process of law.’” *Penterman v. Wisconsin Elec. Power Co.*, 211 Wis. 2d 458, 480, 565

N.W.2d 521 (1997) (quoting U.S. CONST. amend. XIV, § 1). The threshold inquiry in determining whether a substantive due process claim has been established is whether an individual has been deprived of “a liberty or property interest protected by the Constitution.” *Penterman*, 211 Wis. 2d at 480. “A property interest is constitutionally protected if ‘state law recognizes and protects that interest.’” *Thorp v. Town of Lebanon*, 2000 WI 60, ¶46, 235 Wis. 2d 610, 612 N.W.2d 59 (citation omitted).

We note that the primary objective of the statutory cap, as articulated both by *Ferdon* and by the legislature, is to ensure quality and affordable health care for Wisconsin residents while adequately compensating victims of medical malpractice. In this case, the Fund contends that the Mayos’ constitutional challenges are meritless because the legislature’s passage of WIS. STAT. § 893.55(1d) essentially obviated the *Ferdon* ruling. The Fund also contends that its financial viability was a major legislative consideration when enacting the cap and allowing verdicts which exceed the cap to stand would threaten its financial stability.

The Mayos, on the other hand, note that the effect of enforcing the cap would reduce their jury award by over 95 percent and the Fund’s financial records reflect a net asset value of \$1.2 billion as of June 2015, establishing substantial financial viability. The Mayos rely both on the Fund’s audit report and on *Ferdon*, where Matthew Ferdon’s award was reduced by approximately 59 percent,<sup>2</sup> to contend that this reduction would violate their equal protection

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<sup>2</sup> This percentage accounts for the reduction in Matthew Ferdon’s award after the cap was adjusted for inflation.

rights because none of the legislature's articulated objectives would be furthered. They also contend that as intended beneficiaries of the Fund, they have a property interest in their jury award. *See* WIS. STAT. § 655.27(6) ("The fund is established to curb the rising costs of health care by financing part of the liability incurred by health care providers as a result of medical malpractice claims and to ensure that proper claims are satisfied. The fund, including any net worth of the fund, is held in irrevocable trust for the sole benefit of health care providers participating in the fund *and proper claimants.*") (Emphasis added.); ***Wisconsin Med. Soc'y, Inc. v. Morgan***, 2010 WI 94, ¶4, 328 Wis. 2d 469, 787 N.W.2d 22 (holding that beneficiaries named by § 655.27(6) have constitutionally protected property interests in the Fund's assets).

## CONCLUSION

We certify this case to the Wisconsin Supreme Court for clarification on what we perceive to be tension between the principles articulated in ***Ferdon*** and the amended cap on recoverable noneconomic damages outlined in WIS. STAT. § 893.55 as they relate to the facts of this case. Because ***Ferdon*** found the cap in place at the time unconstitutional, and because a due process challenge to an injured patient's noneconomic loss limitation has not been decided in Wisconsin, we believe that certification is appropriate.

